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RESPONSE TO THE MINISTRY OF MUNICIPAL AFFAIRS' REPORT ON MUNICIPAL LIABILITY INSURANCE IN ONTARIO

THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO

FEBRUARY 1987

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ASSOCIATION OF MUNICIPALITIES OF ONTARIO

The Association of Municipalities of Ontario, a non-partisan voluntary organization, is united to promote the values of the municipal government system and the status of the municipal level of government as a vital and essential component of the total intergovernmental framework of Ontario and Canada.

The Association acts as the collective voice of Ontario's municipal governments and is organized to accomplish through cooperation and coordination, what the majority have neither the time nor the resources to do individually.

The Association represents some six hundred (600) municipal governments throughout Ontario. The governing body is composed of some eighty (80) municipal elected and appointed officials, who in turn represent a wide-range of municipal government interest.

The following sections and affiliated municipal professional associations form an important part of the Association's structure and therefore, play an important part in its activities in terms of the Board of Directors, program and policy development:

Association Sections:

* County and Regional Section
* Large Urban Section
* Northern Ontario Section (FONOM/NOMA)
* Rural (ROMA) Section
* Organization of Small Urban Municipalities Section

Association Affiliates:

* Association of Municipal Clerks and Treasurers of Ontario
* Association of Municipal Tax Collectors of Ontario
* Municipal Engineers Association
* Ontario Municipal Administrators Association
* Ontario Municipal Personnel Association
* Ontario Municipal Social Services Association
* Society of Directors of Municipal Recreation of Ontario
* Urban Finance Officers Association of Ontario

To the Municipal Clerk:

Please circulate this Report to the members of council and to the staff of your municipality. Additional copies are available at $5.00 each from the Publications Centre, Association of Municipalities of Ontario, 100 University Avenue, Suite 805, Toronto, Ontario M5J 1V6

TABLE OF CONTENTS

	Page
PREFACE	i
AMO AND FUTURE INITIATIVES	
Group Purchase Program	1
Occupational Health & Safety Act	1
Limitations Act	1
Standard Municipal Insurance Clauses	2
Spills Action Centre	3
Risk Management	3
CHAPTER 1: COST AND COVERAGE	
Automobiles	5
General Liability	6
Statistical Data Base	6
CHAPTER 2: ALTERNATIVE INSURANCE MECHANISMS	
Insurance Fund	8
Group Purchase Programs	9
Self-Insurance	9
Reciprocal Insurance Exchanges	10
CHAPTER 3: MUNICIPALITIES AND THE LAW	
Preamble	15
Municipal Act	15
Cabinet Submissions	17
Negligence Act	18
Courts of Justice Act	18
Adverse Taxation	20
Gross-Ups for Federal and Provincial Personal Income Taxation	20
Double Recovery (Collateral Benefits)	21
OHIP	21
Family Law Act, 1986	22
Capping	23
Occupiers' Liability Act	23
Environmental Protection Act	25
CONCLUSION	27
ACKNOWLEDGEMENTS	28

AMO RESPONSE TO THE FINAL REPORT OF THE ADVISORY COMMITTEE TO THE MINISTER OF MUNICIPAL AFFAIRS ON MUNICIPAL LIABILITY INSURANCE IN ONTARIO

PREFACE

In May of 1986, the Association of Municipalities of Ontario responded to the Preliminary Report of the Minister of Municipal Affairs Advisory Committee on Municipal Liability Insurance (AMO Report 86-8). In November 1986, the Provincial Advisory Committee released its final report and thus completed its mandate to review both the cost and coverage availability problems associated with the municipal liability insurance industry in Ontario and various approaches to resolving these problems. The members of the Advisory Committee and the staff of the Ministry of Municipal Affairs should be commended for their comprehensive and well-written report.

A working group comprised of affiliated organizations of AMO was established to review the recommendations contained in the final report. While AMO was able to complete a response on a number of recommendations by the Ministry's January 31, 1987 deadline, others will take considerably more time to formulate. Issues that directly impact on the Association will have to be reviewed in considerable detail. These recommendations are listed in the first section of this response, "AMO and Future Initiatives".

AMO AND FUTURE INITIATIVES

Group Purchase Programs

Advisory Committee Recommendation:

2.4 Further, the Committee recommends that this provincial Group Purchase Program be established by an organization, such as the Association of Municipalities of Ontario (AMO).

AMO Recommendation: The Association does not have the staff or the financial resources to carry out a study on the establishment of a provincial Group Purchase Program. If AMO were to assume this role, additional funding and resources would be required.

Occupational Health and Safety Act

Advisory Committee Recommendation:

3.3 The Committee recommends that the Ministries of Municipal Affairs, Transportation and Communications, and Labour, together with representatives of the Ontario Good Roads Association and the Association of Municipalities of Ontario conduct an immediate review of the impact that the Highway Traffic and Occupational Health and Safety Acts have on the construction, maintenance and repair of municipal roads and property, so that the Ministers responsible may proceed as quickly as possible with the important amendments referred to.

AMO Recommendation: The Association is prepared to participate on a Ministry of Municipal Affairs, Ministry of Labour and Ministry of Transportation and Communications resource committee.

Limitations Act

Advisory Committee Recommendation:

3.13 The Committee recommends that a sub-committee of the Association of Municipalities of Ontario (AMO) be set up to demonstrate to the Attorney General's staff, the very real and tangible concerns

municipalities have with the practical application of limitation periods, with the hope that a workable approach to municipal notice and limitation periods can be achieved that will satisfy all parties.

AMO Recommendation: The Association is prepared to participate on a committee resourced by the Area Solicitors and Regional Solicitors Groups and the Municipal Engineers Association.

Background: In the preliminary report, the Minister's Advisory Committee strongly recommended that the Attorney General consider municipal concerns, as expressed in a resolution of the Association of Municipalities of Ontario (1985-A1-2), when re-drafting the Limitations Act. AMO's concerns included:

- retention of the three month limitations period for claims based on non-repair of public highways;
- retention of current notice provisions for claims based on non-repair of public highways;
- "capping" of limitations period for claims brought by persons suffering a disability at 10 years;
- exemption from absolution of prescriptive easements for municipalities and public utilities; and
- no adverse possession of lands vested in a municipality.

In its response to this recommendation, AMO reaffirmed its position as stated in its 1985 resolution AL-2: Review of all Sections of the Proposed Legislation Revising the "Limitations Act" Affecting Municipal Government. This resolution was based on the then proposed Bill 160, An Act to Revise the Limitations Act which received First Reading on December 16, 1983 and subsequently died on the order paper. AMO's concerns with respect to this legislation were expressed to the government at that time. A re-drafting of the Limitations Act is necessary since proposed amendments under Bill 160 would have had detrimental effects on municipalities.

Standard Municipal Insurance Clauses

Advisory Committee Recommendation:

3.17 The Committee recommends that the Ministries of Financial Institutions and Municipal Affairs participate with the Association of

Municipalities of Ontario (AMO) and the major municipal insurers in the preparation of mandatory standard municipal insurance clauses, to be used in the provision of, and when quoting on, all municipal insurance policies.

AMO Recommendation: The Association is prepared to participate on a Ministry of Financial Institutions and Ministry of Municipal Affairs resourced committee in the preparation of standard municipal insurance clauses.

Spills Action Centre

Advisory Committee Recommendation:

3.18 The Committee recommends that the Ministry of the Environment, in cooperation with the Association of Municipalities of Ontario (AMO), set up a series of municipal seminars across the province, on a zone basis, to deal with the Spills Bill, the Spills Action Centre, and the Transportation of Dangerous Goods.

AMO Recommendation: Endorsed

Background: In its response to the preliminary report, AMO supported the Minister's Advisory Committee's recommendation that the Ministry of the Environment undertake an informational campaign to provide a better understanding of Part IX of the Environmental Protection Act (Spills Bill) and the Association insurance pool.

Risk Management

Advisory Committee Recommendation:

4.1 The Committee recommends that the Ministry of Municipal Affairs address an urgent need and provide the necessary financing to allow the Urban Finance Officers Association (UFOA), in cooperation wth the Association of Municipalities of Ontario (AMO), to produce a timely risk-management handbook, for use by both large and small municipalities. Such funding should include the cost of publication, circulation and any expert assistance requi-

red, to produce a comprehensive municipal risk-management handbook for all municipalities in Ontario, as early in 1987 as possible.

AMO Recommendation: The Association endorses the concept of the preparation of a Risk Management Handbook for all Ontario municipalities.

AMO supports the Urban Finance Officers Association (UFOA) draft terms of reference for the preparation of a Municipal Risk Management Manual with the provision that the proposal also include a training package for future municipal training programs. AMO, the Society of Directors of Municipal Recreation of Ontario (SDMRO) and the Municipal Engineers Association (MEA), anticipate direct participation and input on the Urban Finance Officers Insurance Committee, responsible for this project.

CHAPTER 1

COST AND COVERAGE

Automobiles

Advisory Committee Recommendations:

1.1 The Committee recommends that although automobile insurance rates do not appear to warrant a degree of concern to municipalities similar to that for general liability insurance rates, a continuing effort be made by the Ministry of Financial Institutions to monitor automobile insurance rates, in order to ensure that a "crisis", similar to the one in the general liability insurance market, does not occur.

AMO Recommendation: The Association supports the Advisory Committee's recommendation.

1.2 The Committee recommends that municipal corporations and other public authorities in Ontario, which establish an adequate plan with appropriate financial guarantees, be entitled to an appropriate exemption from the compulsory Automobile Insurance Act.

AMO Recommendation: The Association supports the Advisory Committee's recommendation.

Rationale: This proposal would avoid municipalities having to purchase "fronting" coverage from licenced automobile insurers which is costly merely to obtain the required "pink slips" for vehicles. Municipalities would, however, have to handle their own auto claims.

The Compulsory Automobile Insurance Act does not permit municipalities to issue a certificate of insurance and therefore a motor vehicle liability insurance card ("pink slip").

General Liability

Advisory Committee Recommendations:

1.3 The Committee recommends that municipalities seriously consider the level of risk they can retain with a view to assuming the cost of higher deductible levels.

AMO Recommendation: The Association supports the Advisory Committee's recommendation.

Rationale: It was felt that higher deductible levels are an economic incentive for loss prevention and risk management.

AMO also agreed with the rationale of the Advisory Committee which stated: Since every 35 cents of each insurance dollar is used to pay commissions, taxes, administrative and other costs, for small losses that are readily budgetted for and do not create economic insecurity, it makes little sense to exchange dollars with an insurer if a large portion of that dollar will be lost in the exchange.

1.4 Further, the Committee recommends that municipalities provide adequate reserves to cover the cost of claims falling within these increased deductible levels.

AMO Recommendation: The Association supports the Advisory Committee's recommendation.

Rationale: The rationale for this recommendation follows the rationale for R1.3. If municipalities increase deductible levels, they should also increase reserve funds to cover the costs of claims within the higher deductible levels.

Statistical Data Base

Advisory Committee Recommendations:

1.5 The Committee recommends that a statutory requirement be enacted to establish a standard system of reporting for municipal insurers to the Superintendent of Insurance, and that the information to be collected be based on the data items outlined in

Appendix B. The Committee further recommends that the Ministry of Municipal Affairs be involved in setting up such a data base to ensure its compatibility with the extensive Municipal Analysis and Retrieval System (MARS) data base of municipal statistics already in existence.

AMO Recommendation: The Association supports the Advisory Committee's recommendation realizing that data items need to be determined and that it will take some time to assemble a data base.

1.6 The Committee further recommends that municipal and insurance representatives be given the opportunity to review and negotiate the outline of data items required in the establishment of a province-wide municipal insurance statistical data base.

AMO Recommendation: The Association supports the Advisory Committee's recommendation.

CHAPTER 2

ALTERNATIVE INSURANCE MECHANISMS

Insurance Fund

Advisory Committee Recommendation:

2.1 (1) In order to alleviate the concern of unusually large claims, the Committee recommends that the Ministry of Municipal Affairs establish a municipal disaster level insurance fund to provide coverage for any claim exceeding $5 million.

(2) The Committee suggests that such a fund be financed through a $2 million contribution from the unconditional grants allocation for each of five years.

(3) The Committee suggests that such a fund be invested with the Ontario Municipal Employees Retirement Savings (OMERS) Plan.

AMO Recommendation:

(1) The Association endorses the Advisory Committee's recommendation that the Ministry of Municipal Affairs establish an insurance fund to provide coverage for any claim exceeding $5 million.

Rationale: This would alleviate the need for municipalities to acquire liability coverage in excess of $5 million.

(2) The Association endorses the Advisory Committee's recommendation that such a fund be financed through a $2 million contribution from the unconditional grants allocation for each of five years.

(3) The Association is currently awaiting for a response from OMERS as to their views on investing the fund and therefore has not yet taken a position on this part of the recommendation pending OMERS response.

Group Purchase Programs

Advisory Committee Recommendations:

2.2 The Committee recommends that group purchase programs for the acquisition of municipal liability insurance coverage be recognized as a viable alternative to conventional insurance arrangements.

AMO Recommendation: The Association endorses the principle of group purchase programs.

2.3 The Committee recommends that all municipalities carry liability insurance protection of $4 million in excess of $1 million and that this coverage be purchased by all municipalities, excluding the Metro Group and other such municipalities that establish self-insurance plans up to $5 million, from a Group Purchase Program acquired through the conventional insurance market. The Committee suggests that the upper and lower limits of this coverage be reviewed for their appropriateness at the time of renewal.

AMO Recommendation:

The Association endorses the Advisory Committee's recommendation if the fund (see Recommendation 2.1(1) for claims exceeding $5 million was established and municipalities could have the options of:

(a) self insurance;
(b) Metro reciprocal; and
(c) group purchase.

Self-Insurance

Advisory Committee Recommendations:

2.5 The Committee recommends that municipal councils and staff make a concerted effort to assess the degree of risk that the municipal corporation is able to bear financially and consider the benefits of self-insuring the largely predictable nuisance category of claims by increasing general liability insurance deductibles and establishing sufficient reserves to cover these costs.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation provided that reserves are used solely for insurance purposes.

Rationale: This recommendation is related to the Advisory Committee's Recommendation 1.3, which the Association also supports.

2.6 The Committee recommends that very large municipalities, such as Metropolitan Toronto, its area municipalities, and other major urban centres, closely examine total self-insurance as an alternative to conventional insurance. In addition, the Committee recommends that reciprocal insurance exchanges with sufficient financial capacity carefully evaluate a total self-insurance program that would eliminate the need to seek expensive reinsurance, which is currently difficult to obtain.

AMO Recommendation: The Association supports the Advisory Committee's recommendation.

2.7 The Committee recommends that the Ministry of Municipal Affairs review and, if necessary, amend its legislation to ensure that it provides clear authority for a municipality to self-insure the corporation's risk of liability, and the liability of its employees, councillors, local board members and employees, including any powers necessary and incidental to the same.

AMO Recommendation: The Association supports the Advisory Committee's recommendation and recommends that the government look at the possibility of reviewing all organizations involved in the municipal sphere, such as: surburban road commissions, conservation authorities and library boards.

Rationale: At present, sections 208(3) and 208(50) of the Municipal Act do not clearly afford municipalities the authority to self-insure.

Reciprocal Insurance Exchanges

Advisory Committee Recommendations:

2.8 The Committee recommends that reciprocal insurance exchanges be recognized as a viable alternative for those municipalities which choose not to continue with conventional insurance services.

AMO Recommendation: The Association supports the Advisory Committee's recommendation and realizes that reciprocal exchanges could be difficult to organize for municipalities.

2.9 The Committee recognizes that not all municipalities may view a reciprocal insurance exchange as an appropriate insurance mechanism for their needs and recommends that participation be voluntary.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

2.10 The Committee recommends that any municipal reciprocal insurance exchange consider utilizing the existing expertise of the Ontario Municipal Employees Retirement Savings (OMERS) Plan to administer the investment of reserve funds.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation recognizing that the Ontario Municipal Employees Retirement Savings (OMERS) Plan be one advisor for consideration for the investment of reserve funds.

Rationale: A properly structured reciprocal should certainly provide for a competent organizational structure which may include an investment committee. The reciprocal could search out the services of an investment advisor as required and the OMERS Board is one area that could be examined but certainly not the only one.

2.11 The Committee recommends that no reciprocal insurance exchange be established without an initial capitalization, so as to ensure that surplus funds would be available to smooth unanticipated claims experience.

AMO Recommendation: The Association supports, in principle, the Advisory Committee's recommendation, but has concerns on how the initial capitalization would be determined.

2.12 The Committee recommends that a municipality's claims history, risk exposure and risk-management levels be made clearly appa-

rent in its levy, to avoid some of the difficulties of selling the concept of a single municipal reciprocal insurance exchange to municipal councils.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation recognizing that this type of levy system is a long-term goal in that it could not be realized until more information on municipal claims history could be compiled.

2.13 The Committee recommends that subsection 149(2) of the Municipal Act, which lists numerous other undertakings that do not require the approval of the Ontario Municipal Board (OMB), be amended to include a reference to agreements for the provision of insurance through a reciprocal insurance exchange.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation but believes that the legislation should be broader to include all insurance matters.

Rationale: In effect, this would allow long-term plans for insurance, including reciprocal plans, to be adopted without having to go to the OMB for approval of a program which would be beyond the lifetime of council.

2.14 The Committee recommends that the Ministry of Municipal Affairs enact legislative amendments to provide clear authority to enable all municipalities to join and form reciprocal insurance exchanges, including any powers necessary and incidental to the same.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

2.15 The Committee recommends that the three per cent premium tax be waived for reciprocal insurance exhanges established by public bodies.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: According to the Advisory Committee's Report,

> "Municipal reserves for any purpose including self-insured deductibles, are not taxable under current

iegislation. The funds contributed to a reciprocal exchange are, in essence, municipal "reserves" for liability claims. The federal government has clearly stated that the taxable income, i.e. interest earned on reserves, is not taxable. In addition, the Committee has learned that pooled municipal funds, such as those utilized by the Metro Insurance Group, have not been subject to the three percent premium tax. In view of the fact that the province has promoted reciprocal insurance exchanges for public bodies, the Committee believes that the Province should recognize the funds set aside by a public reciprocal insurance exchange as a municipal reserve fund and, as such, not subject it to the 3 per cent premium tax."

2.16 The Committee recommends that the Board of Directors of a municipal reciprocal insurance exchange be carefully selected and balanced to provide significant professional representation for all aspects of the undertaking.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

2.17 a. The Committee recommends that municipalities be individually responsible for securing the first $1 million of liability insurance coverage from any of the conventional or alternative sources discussed in this report, which they deem appropriate to service their needs.

b. The Committee recommends that Group Purchase Programs for the acquisition of municipal liability insurance coverage be recognized as a viable alternative to conventional insurance arrangements (R2.2).

The Committee recommends that all municipalities carry liability insurance protection of $4 million in excess of $1 million and that this coverage be purchased by all municipalities, excluding the Metro Group and other such municipalities that establish self-insurance plans up to $5 million, from a group purchase program acquired through the conventional insur-

ance market. The Committee suggests that the upper and lower limits of this coverage be reviewed for their appropriateness at the time of renewal (R.2.3).

Further, the Committee recommends that this provincial Group Purchase Program be established by an organization, such as the Association of Municipalities of Ontario (R.2.4).

c. In order to alleviate the concern of unusually large claims, the Committee recommends that the Ministry of Municipal Affairs establish a municipal disaster level insurance fund to provide coverage for any claim exceeding $5 million. The Committee suggests that such a fund be financed through a $2 million contribution from the unconditional grants allocation for each of five years, and be invested with the Ontario Municipal Employees Retirement Savings (OMERS) Plan (R.2.1).

AMO Recommendation: The Association endorses the Advisory Committee's Recommendation 2.17(a) only.

CHAPTER 3

MUNICIPALITIES AND THE LAW

PREAMBLE

The Association of Municipalities of Ontario concurs with the Ministry's Advisory Committee belief "in the need for incremental changes to the existing laws affecting the tort litigation process and other statutes affecting the level of risk exposure of Ontario's municipalities". AMO also agrees with the Advisory Committee's comment "that the interpretation of the existing laws by the courts has continually expanded municipal liability. As well, the rate of this change appears to have significantly increased in the last few years. Municipalities and insurers are left in a state of uncertainty as to where their risk exposure will expand next."

At AMO's 1986 Annual Conference the Minister of Financial Institutions, the Honourable Monte Kwinter stated his support for tort reform especially in the areas of family law reform, gross-ups, pre-judgement interest, and structured settlements. Mayor Claudette Millar, then President of AMO, appealed to the conference delegation as well as to individual municipalities to continue a persistent effort to make other Ministries aware of the importance of tort reform. She stated that, although many Ministries dealing with municipalities have advised the Ministry's Advisory Committee of their interest in tort reform, implementation of the recommendations will depend on the backing of these Ministries at internal government meetings.

The following chapter represents the Association's position on tort reform. It is believed that until such legislation is amended municipalities, will be left in a state of uncertainty (with regard to insurance and risk).

Municipal Act

Advisory Committee Recommendations:

3.1 The Committee recommends that the Minister of Municipal Affairs act immediately to designate the following persons only as "em-

ployees" for the purposes of paragraph 208(50) of the Municipal Act:

> "Such volunteers as may provide their services on behalf of, or directly to, the municipality, provided that the council of the municipality has first passed a by-law designating such persons or class of persons as employees for the purposes of the Minister's designation."

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Background: The Provincial Committee found that, while many municipalities are currently including volunteers under their municipal insurance policies, no authority appears to exist for them to purchase this coverage from third-party insurers to cover volunteers, nor may they provide such coverage through their self insurance plans. This problem arises as a result of paragraph 208(50) of the Municipal Act, which provides municipalities with the authority to purchase liability insurance on behalf their employees. The definition of "employee" under this paragraph requires the individual being insured to receive a salary. The definition of "employee" also includes any person or class of persons designated as an employee by the Minister of Municipal Affairs.

While AMO has requested general legislation for all volunteers (Good Samaritan) it is recognized that this will take some time. In the interim, the Provincial Committee believes that municipalities should have the authority to provide liability insurance coverage to their volunteers as soon as possible. Since the Minister of Municipal Affairs need only formally recognize volunteers in writing as employees for this paragraph of the Act and notify all Municipalities of this designation the Association requests that the Minister do so as soon as possible.

AMO, in response to the Preliminary Report of the Advisory Committee on Municipal Liability Insurance (AMO Report 86-8, May 1986), endorsed the Advisory Committee's recommendation that the Task Force on Insurance consider some form of "Good Samaritan Legislation" that would protect municipal volunteers.

According to the Ontario Task Force on Insurance Report (Slater Report), a number of groups and organizations have urged that

"Good Samaritan Legislation" be enacted to provide greater tort protection to volunteers providing medical and other assistance.

In 1970, the Ontario Law Reform Commission (OLRC) rejected such legislation, stating the need for legislative intervention had not been established. The voluntary sector are, however, experiencing problems of insurance availability and affordability.

3.2 The Committee recommends that paragraphs 43 and 44 of Section 208 of the Municipal Act be amended to allow all municipalities, including regions, the authority to delegate to a committee or municipal officer the power to temporarily close roads.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: In 1986, AMO endorsed a resolution, "AL-14: Amendment to the Municipal Act Regarding Temporary Road Closings for Construction and Maintenance", which requested that the Minister of Municipal Affairs be petitioned to amend the Municipal Act, Section 208(43) to allow municipal councils to delegate the temporary road closings for construction and maintenance purposes for periods up to 30 days to the municipal engineer or person designated by council. It was felt that the present legislation does not permit temporary road closures for construction activities performed by agencies such as Bell Telephone, gas, hydro, water, etc., except by municipal by-law. In most emergency situations, it is impossible to obtain the necessary by-law prior to commencing work. Municipal liability is impacted by inadequate legislation.

Cabinet Submissions

Advisory Committee Recommendation:

3.4 The Committee recommends that the province establish a policy requiring all Cabinet submissions involving amendments to legislation or new legislation to include a statement as to whether and how the proposal will impact on municipal liability.

AMO Recommendation: The Association strongly supports the Advisory Committee's recommendation.

Rationale: Currently, municipalities have to "react" to new legislation affecting municipal liability, such as: the Spills Bill, Part IX of the Environmental Protection Act; the Municipal-Industrial Strategy for Abatement; Bill 112, An Act Respecting the Enforcement of Statutes Related to the Environment; and proposed changes to special occasion permits.

Negligence Act

Advisory Committee Recommendation:

3.5 The Committee recommends that the doctrine of "joint and several" liability only be applied when negligent persons are truly acting in a joint venture. Otherwise, each dependant should pay according to the degree of fault determined by the courts. The Committee further recommends that the Ontario Law Reform Commission design appropriate legislation to reflect this change as quickly as possible and that the Attorney General implement such legislation without delay.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: In its response to the Preliminary Report of the Advisory Committee on Municipal Liability Insurance, AMO supported the Advisory Committee's recommendation that the Task Force on Insurance consider revisions to the "joint and severally" provision of the Negligence Act that would restore the fundamental concepts of the tort system. Currently, the effect of the "joint and severally" provision is, that in cases where one party who is found to be negligent is unable to pay, the others are left with the entire burden of payment even if they are only partially at fault. In effect, it has become a search for a payer with the "deepest pocket" rather than payment according to the degree of fault.

Courts of Justice Act

Advisory Committee Recommendations:

3.6 The Committee recommends that the Courts of Justice Act be amended to provide that, in actions involving bodily injury, pre-

judgement interest with respect to non-pecuniary loss not commence until the plaintiff has either:

1. Disclosed to the defendant, or the defendant's insurer, the extent and nature of the injuries sustained; or

2. The plaintiff has agreed to make himself or herself available for a medical examination on reasonable notice, and that the defendant will pay all related expenses incurred and supply a copy of the report upon receipt to the plaintiff.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: Currently, pre-judgement interest commences at the time the defendant receives notice of the plaintiff's injury. At this point, the defendant does not have enough information (if the plaintiff has not made himself available for a medical examination) to offer a settlement payment. An amendment in line with the Advisory Committee's recommendation would accelerate the court process as it would require the plaintiff to assess their case at the earliest possible time.

3.7 The Committee recommends that the Attorney General amend Section 129 of the Courts of Justice Act to give the courts authority to impose structured settlements for all, or any part of an award, in appropriate circumstances.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: In its response to the Preliminary Report of the Advisory Committee on Municipal Liability Insurance (AMO Report 86-8, May 1986), AMO endorsed the Committee's recommendation that the Task Force on Insurance consider revising Section 129 of the Courts of Justice Act to give the courts authority to impose structural or periodic payment settlements for all or any part of an award as a third option for the courts in a proceeding where damages are claimed for personal injuries or under Part V of the Family Law Reform Act.

Adverse Taxation

Advisory Committee Recommendation:

3.8 The Committee recommends that the Province of Ontario request the federal government to broaden the categories of defendants in the Income Tax Act who can be involved in structured settlements without suffering adverse taxation.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: The Association was in agreement with the Advisory Committee's rationale. "As it stands now, non-insured individuals (self-insured or retaining large deductibles) and corporate entities are responsible for the income tax payable on the investment income earned on structured settlements". Insurance companies are not responsible for income tax or investment income earned on structured settlements. "In such cases (non-insured individuals and corporate entities), structured settlements are an impractical alternative. The Advisory Committee believes that every effort should be made to encourage the use of structural settlements."

Gross-Ups for Federal and Provincial Personal Income Taxation

Advisory Committee Recommendation:

3.9 The Committee recommends that the Province of Ontario direct the federal government to forego collecting the provincial share of the personal income tax on lump-sum awards immediately and that it request the federal government to follow suit by removing the inherent unfairness in the Income Tax Act that requires the collection of personal income taxes on the income generated by lump-sum awards.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: It is estimated that taxes add a third or more to the cost of lump-sum awards. The Honourable Monte Kwinter, Minister of Financial Institutions, at the AMO Annual Conference, stated that changes to taxation laws governing gross-ups were

important legislative changes that he would support. The Ontario Task Force on Insurance suggested that the present taxation of investment income on lump-sum awards is "nonsensical".

Double Recovery (Collateral Benefits)

Advisory Committee Recommendation:

3.10 The Committee recommends no change to the current laws respecting collateral benefits.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: A person who has had the foresight to purchase extra private coverage should be able to benefit from that foresight. Why should the insurance company or defendant benefit from the plantiff's foresight?

OHIP

Advisory Committee Recommendation:

3.11 The Committee recommends that the Minister of Health and the Superintendent of Insurance implement a universal OHIP Subrogation Program that would remove the cost of OHIP-related medical care completely from the Tort system.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: In its response to the preliminary report of the Advisory Committee on Municipal Liability Insurance, AMO supported the recommendation that the Task Force on Insurance consider a similar system as the agreement between OHIP and the automobile insurance industry, for all liability claims, fully recognizing that it may require some time to establish a credible data base upon which to determine an adequate level of compensation.

Family Law Act, 1986

Advisory Committee Recommendation:

3.12 The Committee recommends that the Insurance Bureau of Canada monitor the impact of the amendments to the Family Law Act, 1986 and justify the need for further change.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: The Advisory Committee believed that too little time had elapsed to judge whether the amendments to the Family Law Act, 1986, enacted in March of this year, are achieving the desired results. In March 1986, the requirement for a single suit (all family members) was removed, as was the obligation of the plaintiff to name, select and advance a claim on behalf of such claimants. These changes were implemented at the request of the Insurance Bureau of Canada as an attempt to cut down on the number of frivolous and minor claims.

However, at the 1986 Annual Conference, AMO endorsed a preeminent resolution MI-1, "Introduction of Legislation with respect to Municipal Liability Insurance". Part (b) states:

> "Therefore be it resolved that the Premier of Ontario and the Attorney General be requested to review the provisions of Bill 1, An Act to revise the Family Law Reform Act, particularly Section 61 thereof, in light of the current court decisions, to reduce the uncertainty and to reduce the exposure to claims for compensation that the claimant might reasonably have expected to receive from the person injured if the injury or death had not occured."

The Canadian Bar Association of Ontario (CBAO) and the Committee for Fair Action in Insurance Reform (FAIR) have also suggested further amendment to the Act that would restrict the category of claimants to those individuals who have suffered "serious and permanent loss" of guidance, care and companionship as a result of an accident, thus, reducing the exposure for claims of compensation.

Background: Bill 1, An Act to revise the Family Law Reform Act increased municipal exposure by broadening the right to compensa-

tion to include parents, children, siblings, grandparents and grandchildren. However, the requirement that all claims must be represented in a single suit was removed.

Capping

Advisory Committee Recommendation:

3:14 The Committee recommends that no further capping of awards be considered.

AMO Recommendation: The Association supports the Advisory Committee's recommendation provided that the province moves expeditiously to amend legislation concerning; joint and severally provisions of the Negligence Act (Rec. 3.5); Courts of Justice Act regarding pre-judgement interest (Rec. 3.6); Courts of Justice Act regarding structured settlements (Rec. 3.7); Income Tax Act regarding categories of defendants who can be involved in structured settlements (Rec. 3.8); Occupiers' Liability Act with regard to the use of municipal premises (Rec. 3.15) and Occupiers' Liability Act with regard to lesser duty of care (Rec. 3.16).

However, should the Province not move expeditiously to amend these Acts, then the Association supports its resolution MI-1, that the Province of Ontario enact a legislative ceiling on court awards that may be made arising from municipal liability actions, particularly relating to punitive damages.

Background: At the 1986 Annual Conference, AMO endorsed a preminent resolution MI-1, "Introduction of Legislation with respect to Municipal Liability Insurance". Part (c) states:

> "Be it resolved that the Province of Ontario enact a legislative ceiling on court awards that may be made arising from municipal liability actions, particularly relating to punitive damages."

Occupiers' Liability Act

Advisory Committee Recommendations:

3:15 The Committee recommends municipalities be accorded the right to post their policies concerning the use of those municipal premises

enumerated in subsection 4(4) of the Occupiers' Liability Act at various strategic locations within the municipality and that signage be effective to bring into play the lesser duty of care set out in subsection 4(1) of that Act, in respect of those listed premises.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: In its response to the Preliminary Report of the Advisory Committee on Municipal Liability Insurance, the Association endorsed the Advisory Committee's recommendation that, much like speed limit signs that are posted at given points in a municipality advising motorists of the limit (unless otherwise stated), signs limiting permission or prohibiting the use of municipal lands (unless otherwise posted) would be as practical and substantially less costly than the current requirements.

3:16 The Committee also recommends that subsection 4(4) of the Occupiers' Liability Act be expanded to include the following premises as being subject to the lesser duty of care set out in subsection 4(1) of that Act:

1. Vacant undeveloped premises owned by a municipality or local board thereof, as defined in the Municipal Affairs Act; and

2. Recreational lands owned by a municipality or local board thereof, as defined in the Municipal Affairs Act, when such lands are used for the purposes of recreational activity by persons in respect of whom the municipality or local board does no assume direct supervision or control.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: In its response to the Preliminary Report of the Advisory Committee on Municipal Liability Insurance, the Association reaffirmed its position with regard to the Occupiers' Liability Act that the words "public property" or at least "public parks and recreation grounds" be included along with other classes of property listed in subsection 4(4) of the Act.

Background: Currently under sub-section 4(4) of the Occupiers' Liability Act, the following premises are subject to a lesser duty of care.

a) rural premises used for agricultural purposes, including land under cultivation, orchards, pastures and woodlots; and rural premises that are vacant or undeveloped;

b) golf courses when not open for playing;

c) utility rights-of-way and corridors, excluding structures located thereon;

d) unopened road allowances;

e) private roads reasonably marked by notice as such; and

f) recreational trails reasonably marked by notice as such.

Environmental Protection Act

Advisory Committee Recommendations:

3.19 The Committee recommends that the Ministry of the Environment reimburse municipalities directly and promptly for the costs they incur in the clean-up of any spill for which they are not directly responsible.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: Section 85(4)(5)(6)(8) of the Environmental Protection Act states:

> "that where a pollutant is spilled and the Minister is of the opinion that there are or are likely to be adverse effects, and that it is in the best interest of the public to make an order under this section, the Minister may make an order to: (4) the municipality or regional municipality or both of them within whose boundaries

the spill occured; (5) any municipality or regional municipality contiguous to the municipality or regional municipality within whose boundaries the spill occured; (6) any municipality or regional municipality that is affected or that may reasonably be expected to be affected by the spill of the pollutant; (8) any person who is or may be adversely affected by the pollutant or whose assistance is necessary in the opinion of the Minister, to prevent, eliminate or ameliorate the adverse effects or to restore the natural environment."

Currently, a municipality has the right to compensation for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction from the owner of the pollutant and the person having control of the pollutant. A municipality must therefore take legal action against the owner of a pollutant or person having control of a pollutant for reimbursement of costs incurred in cleaning up a spill under the direction of the Minister of the Environment.

3.20 The Committee recommends that each municipality designate an emergency number that can be called after normal business hours in case of an emergency. Further, the Committee recommends that the Ministry of Municipal Affairs list this emergency number in the municipal directory published each year.

AMO Recommendation: The Association endorses the Advisory Committee's recommendation.

Rationale: Section 80(i)(j) of the Environmental Protection Act requires that every person having control of a pollutant that is spilled and every person who spills or causes or permits a spill of a pollutant shall forthwith notify, the municipality or regional municipality.

Currently, there is no comprehensive record which lists municipalities' emergency numbers.

CONCLUSION

While the Association has responded to all of the recommendations contained in the Ministry of Municipal Affairs Advisory Committee Report, considerable more work will have to be conducted. The establishment of reciprocals and group purchase plans including AMO's participation will require more research and thought. In addition AMO will continue to monitor and support those areas which have been indicated in the report as requiring more work such as tort reform. In terms of risk management, AMO will be working with the Urban Finance Officers Association (UFOA) the Society of Directors of Municipal Recreation of Ontario, and the Municipal Engineers Association in the preparation of a Risk Management Handbook for all Ontario municipalities.

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